90-938

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1990

GLENN GUNN and DEBORA GUNN, JOSEPH REYNOLDS and CONSTANCE SIRSICK, RICHARD J. REYNOLDS and ROBERT J. REYNOLDS,

Petitioners,

- against -

FRANK PALMIERI, KATAN GARDENS ASSOC., a partnership, BLOCK 5438 REALTY CORP. and TENADUS LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the allegations of fraud upon which a civil RICO complaint is based are pleaded with sufficient particularity to comply with FRCP 9(b) where those allegations set forth the false statements, the respect in which they were misleading, when, where and by whom made.

2. Whether the District Court having determined that a complaint states a RICO claim, may refuse to reinstate those claims based on failure to state a RICO claim.

3. Whether material misrepresentations made during discovery and misrepresentations made to the Court may form the basis for an obstruction of justice claim in the RICO action in which they were made.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Glen Gunn and Debora Gunn, Joseph Reynolds and Constance Sirsick, Richard Reynolds and Robert Reynolds, petitioners herein, pray that a writ

of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 2, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported and is printed in the Appendix, pages 1 to 6. The memorandum and order of the United States District Court for the Eastern District of New York from which an appeal was taken is printed at Appendix pages 7 to 10.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit (Appendix pages 1 to 6) was entered on April 2, 1990. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254.

STATUTES INVOLVED

Rule 9. Pleading Special Matters

(a) Capacity . . . . . .

(b) Fraud, Mistake, Condition of the

Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

18 U.S.C. §1961(1)

"racketeering activity" means (a) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds),

sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of

stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

18 U.S.C. §1503. Influencing or injuring officer or juror generally

Whoever corruptly, or by threats or

force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication influences obstructs or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than

five years, or both.

STATEMENT OF THE CASE

This action was originally commenced in the United States District Court for the Eastern District of New York pursuant to 18 U.S.C. 1961-1964 (RICO).

In or about November, 1981, defendant Palmieri formed defendant 5438 Realty Corp. (hereafter "5438 Realty"). In or about 1982, 5438 Realty entered into a partnership with defendant Tenadus, Ltd., a wholly owned subsidiary of the Union Savings Bank of Patchogue, Long Island. That partnership is defendant Katan Gardens Assoc. (hereafter "Katan").

The alleged purpose of the partnership was to construct a project of 106 condominium residences (hereafter "the project") at Great Kill, Staten Island, and sell them for profit. Palmieri was the builder of the project.

In June, 1985, plaintiffs Glenn and Debora Gunn, attracted by an advertisement in

the Staten Island Advance met with Loretta Miller, an agent of defendants, to obtain information concerning the project. On July 10, 1985, plaintiffs Glenn and Debora Gunn entered into a contract to purchase a condominium residence in the project. Plaintiffs Joseph Reynolds and Constance Sirsick entered into a contract of sale on December 13, 1985, the same day that plaintiffs Richard and Robert Reynolds, Joseph's brothers, entered into a contract of sale. None of the plaintiffs were permitted to inspect the homes during construction. The Gunns were given a walk through on the day of the closing but none of the lighting fixtures had light bulbs in them at the time, so that there was insufficient light to properly inspect, and the Gunns were rushed through.

Title to the Gunn's home closed on June 23, 1986. Neither the Reynoldses nor Constance Sirsick were permitted to inspect their homes prior to closing though defendant

Palmieri personally assured them at the closing that all defects, if any, would be promptly cured. Title to the Reynoldses homes closed on June 27, 1986.

Pursuant to the contracts of sale and the condominium offering plan, plaintiffs were to receive title to homes that were completed and built in a workmanlike manner in accordance with approved plans filed with the City of New York Department of Buildings and Building Department specifications, and defendants Palmieri and Katan warrantied the construction and are obligated to correct all defects of which they receive notice. However, upon moving into the structures purchased by them, plaintiffs discovered that the buildings were constructed in a shoddy and unworkmanlike manner not in compliance with the contracts of sale, the approved plans, the offering plan, the codes, regulations and laws of the City and State of New York.

The shoddy and unworkmanlike construction

resulted in unlevel floors, cracking walls, leaking roofs, warped joists and beams, unpolished taping surfaces, uneven walls and ceilings and other problems. Other structures in the development have similar problems though the model home that plaintiffs were shown prior to signing the contracts of sale had no such problems and was constructed in a professional and workmanlike manner.

Plaintiffs complied with their obligations under the contracts by giving notice of the defects and demanded that the defects be corrected. However, defendants have failed and refused to correct the defects.

This action was timely commenced in the United States District Court for the Eastern District of New York by filing a complaint alleging violation of 18 U.S.C. §1961 et seq. (RICO) and breach of contract and warranty on May 6, 1987. The action was assigned to Judge Weinstein. By order dated May 10, 1987, the

action was referred to Magistrate Amon for all pre-trial matters. A summons, and complaint, was served on defendants on or about May 21, 1987. Defendant Tenadus Ltd. answered on or about June 7, 1987, and counterclaimed seeking FRCP Rule 11 sanctions. Plaintiffs replied on or about July 2, 1987.

Defendants Palmieri, Katan Gardens Assoc. and Block 5438 Realty Corp. moved to dismiss the complaint for failure to state a RICO claim, and for Rule 11 sanctions, the return date of which was July 7, 1987. The motion was heard by Judge Weinstein on July 23, 1987. The court denied that motion without prejudice and directed defendants to make a motion for summary judgment.

Plaintiffs sought discovery. At a conference before Magistrate Amon on September 11, 1987, the Magistrate sought settlement of the action. In view of the hostility of the Court to the action, plaintiffs agreed to withdraw the action and bring an action in

state court provided that defendants accept service on their attorneys. This was agreed between the parties. However, subsequent to the conference and submission to defendants' attorneys of a Stipulation of Discontinuance of the action, defendants' attorneys refused to consent to discontinuance unless plaintiffs agreed to limit the state court action to causes of action for breach of contract. Plaintiffs refused.

A letter to the court explaining that plaintiffs would not withdraw the action under such conditions resulted in the recusal of Judge Weinstein and Magistrate Amon. The action was thereupon assigned to Chief Judge Platt who directed plaintiffs to move to amend their complaint. Defendants cross-moved to dismiss for failure to state a RICO claim and for Rule 11 sanctions.

By order dated November 17, 1987, the court granted the motion to amend and denied the cross-motion to dismiss without prejudice

for leave to renew following discovery.

An amended complaint setting forth nine causes of action was served on defendants on or about November 23, 1987.

Defendants answered on or about January 19, 1988.

On or about December 8, 1987, plaintiffs served a First Request for Admissions on Defendants. Defendants served their responses to that request on or about January 19, 1988.

Defendants also served a demand for a deposition of plaintiffs on or about January 19, 1988. The depositions were taken on May 23, 1988; defendants served Interrogatories on plaintiffs on January 19, 1988, which Interrogatories were responded to on March 7, 1988. Defendants' expert inspected the premises on August 25, 1987. Though defendants have been given two subsequent opportunities to re-inspect the premises, they have failed to do so.

Plaintiffs served on defendants a demand

for documents on or about May 31, 1988. Defendants responded on or about June 30, 1988, but failed to produce any documents.

Plaintiffs served a demand for a deposition of defendant Palmieri. Palmieri appeared to be deposed on June 16, 1988. However, Palmieri alleged that he did not understand the English language well enough to continue so the deposition was adjourned. During this deposition, Palmieri's attorney represented that Palmieri "does neither read or write English". Palmieri also gave a false residence address.

The action was referred to Magistrate Caden for pre-trial matters. Defendants having failed to comply with plaintiffs' demand for documents, a conference was held before the Magistrate. As a result of that conference, Magistrate Caden, by order dated September 2, 1988, directed defendants to move to dismiss for failure to state a RICO claim and for Rule 11 sanctions (Appendix at pages

11 to 27). The Magistrate ruled that the amended complaint failed to properly plead fraud pursuant to FRCP 9(b) and to properly plead the enterprise element of a RICO claim though Judge Platt had ruled that the amended complaint did indeed state a cause of action.

Nevertheless, plaintiffs withdrew the action which was administratively closed without prejudice on September 21, 1988.

In light of the rulings of the United States Court of Appeals for the Second Circuit in the cases of Beauford v. Helmsley 865 F.2d 1386 (2d Cir. 1989), and U.S. v. Indelicato 865 F.2d 1370 (2d Cir. 1989), plaintiffs moved by notice dated February 6, 1989 to reinstate their RICO claims and amend their amended complaint to conform with those decisions. The proposed amended complaint (Appendix at pgs 31 to 50) alleges as predicate offenses mail fraud, including the posting of contracts of sale and other documents to plaintiffs' attorneys and others, and advertising in the

Staten Island Advance, which is sent through the mails, and obstruction of justice. The obstruction of justice allegations are based upon material misrepresentations made in pleadings, Palmieri's deposition and before the court by defendants and their attorneys in this action.

The motion was referred to Magistrate Caden for a report and recommendation. By Report and Recommendation dated April 10, 1989, the Magistrate recommended that the motion to reinstate be denied on the ground that the proposed amended complaint fails to allege sufficient continuity and fails to plead fraud with sufficient particularity to comply with FRCP 9(b).

Plaintiff filed objections to the Report and Recommendations. Defendants filed responses to those objections.

On or about July 19, 1989, plaintiff filed a Supplemental Affirmation based upon the decision of this Court in H.J. Inc. v.

Northwestern Bell Telephone Co., 492 U.S. , 109 S.Ct. 2893, 109 L. Ed.2d 195. Defendants filed Affirmations in Opposition.

By order dated September 29, 1989, the court denied plaintiffs' motion to reinstate their RICO claims (Appendix at 7 to 10). The court held that the acts pleaded in the proposed amended complaint fail to show a pattern of illegal activity and that plaintiffs' allegations of obstruction of justice as pleaded are "ridiculous".

Plaintiffs appealed to the United States Court of Appeals for the Second Circuit. By order dated April 2, 1990, the Second Circuit affirmed the lower court's order. The Second Circuit held that the allegations of fraud in the proposed amended complaint lacked the specificity required by FRCP 9(b). Plaintiffs now seek review of that order by this Court.

REASONS FOR GRANTING WRIT

In holding that the proposed amended complaint (hereafter "the complaint") does not

plead fraud with the requisite particularity to comply with FRCP 9(b), the United States Court of Appeals for the Second Circuit (hereafter "the 2d Circuit") has so far departed from the accepted and usual course of judicial procedures as to call for an exercise of this Court's power of supervision and has decided an important federal question in a way that conflicts with applicable decisions of this Court and its own decisions. Moreover, by holding that plaintiffs' other contentions are without merit, the 2d Circuit has affirmed the District court's dismissal of a case of first impression that should be reviewed by this Court.

A. The ruling of the 2d Circuit does not follow established legal precedent and its own rulings concerning the Particularity Requirement of Rule 9(b)

The 2d Circuit held that in order to comply with Rule 9(b), a plaintiff must specify the statements alleged to be false or misleading; give particulars as to the respect

in which the statements were fraudulent; state when and where the statements were made and identify those responsible for the statements.

In addition, the complaint must contain factual allegations that give rise to a strong inference of requisite fraudulent intent. Id. Though this court has not specifically ruled on this issue, i.e. the requirements to be met to comply with Rule 9(b), the Courts of Appeals are unanimous that the requirements articulated by the 2d Circuit be met, and this Court has consistently refused to grant certiorari to review those holdings. See Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 49-51 (2d Cir. 1987); cert. denied 48 U.S. 1005 (1988).

The complaint complies with those requirements. Therefore, the 2d Circuit has departed from the accepted and usual course of judicial procedures and has decided an important federal question in a way that conflicts with its own decisions and those of

the other courts of Appeals.

I. Statements alleged to be false or misleading

The complaint sets forth the false statements as follows:

28. Pursuant to the contracts of sale and the condominium offering plan, plaintiffs were to receive title to homes that were completed and built in a workmanlike manner in accordance with certain plans and specifications, and defendants Plamieri and Katan Gardens Assoc. warrantied the construction and are obligated to correct all defects in the construction (A at 38).

26. Neither the Reynoldses nor Constance Sirsick was permitted to inspect their homes prior to closing, though at the closing they were assured by defendant Palmieri that their homes were completed and any problems that they had would be rectified without delay (A at 37-38).

II. Particulars as to falsity of statements.

The complaint sets forth the particulars as to the respect in which the statements were false as follows:

29. Upon moving into the structures purchased by plaintiffs, plaintiffs discovered that the structures were constructed in a shoddy and unworkmanlike manner not in compliance with the plans and specifications referred to in the offering plan and contracts of sale, regulations and laws of the City or State of New York (A at 38).

30. The shoddy and unworkmanlike manner of construction has resulted in unlevel floors, cracking walls, leaking roofs, warped joists and beams, unpolished taping surfaces, gaps between the walls and floors and windows and walls, uneven walls and ceilings and other problems (A at 39).

32. Plaintiffs have complied with their obligations under the contracts of sale by giving notice to defendants of the defects and

have demanded that the defects be corrected, but defendants have failed and refused to correct the defects (A at 39).

III. When and where the false statements were made.

As set forth supra., the false statements were made in the offering plan, contracts of sale and at the closings. Those dates are specifically set forth in the complaint.

19. Plaintiffs Glenn and Debora Gunn entered into a contract, dated July 10, 1985, to purchase a condominium residence located at 151B Colon Avenue (a/k/a 8B Katan Loop), Staten Island, N.Y. (A at 36).

22. Title to the Gunns' home closed June 23, 1986. (A at 37).

23. Plaintiffs Joseph Reynolds and Constance Sirsick entered into a contract dated December 13, 1985, to purchase a condominium residence located at 145B Colon Avenue (a/k/a 5B Katan Loop) Staten Island, N.Y. (A at 37).

24. Plaintiffs Richard J. Reynolds and Robert J. Reynolds enter [sic] into a contract dated December 13, 1985, to purchase a condominium residence located at 145A Colon Avenue (a/k/a 5A Katan Loop), Staten Island, N.Y. (A at 37).

27. Title to the Reynoldses and Constance Sirsick's homes closed on June 27, 1985 (A at 38).

IV. Persons making the statements.

As set forth supra., the fraudulent statements were made by defendant Palmieri at the Reynolds and Sirsick closing. They were also made by the partnership in the offering plan and contracts of sale.

Hence, the complaint sets forth the particulars of the fraudulent statements in compliance with Rule 9(b) as interpreted by the 2d Circuit and all other Courts of Appeals. Nevertheless, the 2d Circuit held that these allegations are not sufficiently specific.

The 2d Circuit also held that the complaint lacked factual allegations sufficient to give rise to a "strong inference" of requisite intent.

A common method for establishing a strong inference of scienter is to allege facts showing a motive for committing fraud and a clear opportunity for doing so. Beck v. Manufacturers Hanover Trust Co., 820 F. 2d 46, 51 (2d Cir. 1987), cert. denied, 484 U.S. 1005 (1988) [the authority cited by the 2d Circuit in its affirmance]. The complaint alleges such facts as follows:

1. This action is brought by plaintiffs in response to defendants' fraudulent scheme to construct and pass off shoddily built structures as completed residences in violation of contracts between defendants and purchasers of the structures including, but not limited to, plaintiffs, warranties and applicable building codes, standards and laws. Among other things, defendants did conspire to

pass off the structures referred to as completed residences and did pass off the structures referred to as completed residences and did transfer those structures for profit and did fail to inform plaintiffs of material defects in the construction of the structures (A at 31-32).

13. The purpose of the partnership was to construct alleged condominium residences in Staten Island in a shoddy manner and fraudulently pass them off as completed residences to purchasers in order to profit by the sale of those structures (A at 34).

20. During the construction of the home that the Gunns had contracted to buy, the Gunns repeatedly requested that an engineer be permitted to inspect the construction of their home but were informed by defendants Palmieri and Katan Gardens that "the insurance company" would not permit anybody but construction workers on the site (A at 36).

21. On June 23, 1986, the Gunns were taken to the site by a representative of defendant Katan Gardens, given the keys to their home and told to hurry and inspect because they had to get to the closing in Manhattan immediately (A at 36).

25. None of these purchasers [the Reynoldses and Sirsick] was permitted to have an engineer inspect the construction of their home (A at 37).

26. Neither the Reynoldses nor Constance Sirsick was permitted to inspect their homes prior to closing ..... (A at 37-38).

In addition paragraphs 29 and 30, set forth at 2 supra., allege that the structures were shoddily built and the results of the shoddy workmanship.

31. Most of the structures in the development have similar problems though the model home that plaintiffs were shown prior to signing the contracts of sale had no such problems and was constructed in a professional

and workmanlike manner (A 39).

32. Plaintiffs have complied with their obligations under the contracts of sale by giving notice to defendants of the defects and have demanded that the defects be corrected, but defendants have failed and refused to correct the defects (A at 39).

Therefore, though the complaint complies with the requirements of Rule 9(b), the 2d Circuit has held that it does not. This holding so conflicts with established precedent as to call for an exercise of this Court's power of supervision.

> B. The particularity requirements of Rule 9(b) as interpreted by the Courts of Appeals are an issue of major public importance requiring a definitive ruling by this Court.

The particularity requirements of Rule 9(b) have been the cause of a plethora of motion practice and appeals. The recent decision of this Court in the case of H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S.

, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), establishing the requirements for pleading a civil RICO action, can only lead to an increase of such litigation, the majority of civil RICO actions being based on fraud. Yet, this Court has yet to hand down a definitive ruling on the requirements necessary to comply with Rule 9(b) and whether the requirements set forth by the Courts of Appeals are too stringent to satisfy the purpose of Rule 9(b).

The purpose of Rule 9(b) is threefold: to provide defendant with fair notice of plaintiff's claim, to protect defendant from harm to his or her reputation and goodwill, and to reduce the number of strike suits. Cosmas v. Hassett, 886 F2d 8, 11 (2d Cir. 1989) [citations omitted]. In order to fulfill this purpose, the Courts of Appeals have required that plaintiffs adequately specify the statements alleged to be false, give particulars as to the respect in which plaintiff contends the statements were

fraudulent, state when and where the statements were made, and identify those responsible for the statements. Id.

Though the complaint complies with these requirements (See B, infra.) the 2d Circuit ruled that it did not. Nevertheless, there is no precedent from this Court to guide the lower courts in application of these requirements. For instance, must the statements alleged to be false be repeated verbatim, paraphrased, generally averred or must just their content be set forth to be "adequately specified"? Is a pleading that provides defendant with fair notice of the claim against him sufficient though the time and place of the making of the false statements are not included? Where the false statements are set forth in an offering plan and contracts of sale is the allegation that they are so set forth sufficient or must the person who drafted those documents be named? A corresponding question is what quantum of

specificity is necessary to provide defendant with notice of the charges against him and avoid strike suits. This Court's guidance on this issue is necessary.

Though writs of certiorari have been sought to review decisions on rule 9(b), this court has consistently denied them. In as much as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court has not rigorously insisted that the petition be granted such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950).

Thus, this Court has given no guidance on this issue. In light of the burden on the federal court system caused by the amount of litigation created by this issue, which could be avoided by a definitive ruling by this Court, the interpretation of the particularity

requirements of Rule 9(b) has become an issue of major public importance.

C. The decision of the 2d Circuit in this action is in Conflict with other Courts of Appeals decisions

The 2d Circuit held that factual allegations must be pleaded that give rise to "strong inference" of requisite fraudulent intent (A at 3). This holding conflicts with the decisions of other Courts of Appeals on this issue.

The clear weight of authority is that Rule 9(b) requires specification of the time, place and content of an alleged false representation but not the circumstances or evidence from which fraudulent intent could be inferred. McGuity v. Beranger Volkswagen, Inc., 633 F.2d 226 (3d Cir. 1980) [citations omitted].

Thus while the Court of Appeals for the Second Circuit demands facts that give rise to a "strong inference" of scienter, the Third Circuit does not require more than general

averments of scienter, as does Rule 9(b) itself. Therefore, there is a conflict on this issue between the Courts of Appeals that must be resolved by this Court.

D. Plaintiffs' allegations that defendants obstructed justice in this action present a case of first impression that should be reviewed by this Court.

Plaintiffs allege that defendants obstructed justice in violation of 18 U.S.C. § 1503. This offense is listed as a predicate offense at 18 U.S.C. § 1961. This is a case of first impression in that plaintiffs allege obstruction of justice in a RICO action as a predicate offense in that same action. However, plaintiffs submit that there is no bar to such allegations either in the statute, case law or legislative history of 18 U.S.C. § 1961.

Plaintiffs allege various acts constituting obstruction of justice by defendants and their attorneys. Those acts include making false denials in pleadings,

false representations during a deposition, false representations in open court and obstruction of discovery. That these acts are offenses is clear from the power granted to the court to sanction them pursuant to FRCP 11 and 37. They are also indictable though committed in a civil action. See U.S. v. Blohm, 579 F.Supp. 495, 497 (SDNY 1983). Therefore, these are indictable acts as required by 18 U.S.C. § 1961.

In denying plaintiffs' motion, the district court labeled the allegations of obstruction of justice "ridiculous". However, the court referred only to those allegations that allege that defendants made false denials of material facts in their answers. This is only a fraction of the conduct alleged to be obstructive. The 2d Circuit held that plaintiffs' arguments on this issue were without merit.

Plaintiffs allege that defendant Palmieri and his attorney lied during Palmieri's

deposition; Palmieri gave a false residence address and his counsel represented that Palmieri neither reads nor writes the English language.

The purpose of an examination before trial is investigative. It is used to discover evidence and information that may lead to evidence. Koster v. Chase Manhattan Bank, 93 F.R.D. 471, 474 (SDNY, 1982). A grand jury proceeding in a criminal action is also investigative in nature. In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 248 (2d Cir. 1985); cert. denied, Roe v. U.S., 475 U.S. 1108, 89 L.Ed. 2d 914, 106 S.Ct. 1515 (1985). Thus, the two proceedings are analogous in their investigative function. To lie to a grand jury and conceal evidence is an indictable offense under 18 U.S.C. §1503.

Therefore, to lie at a deposition in a civil matter is also indictable as obstruction of justice.

In a recent criminal action in the Eastern District of New York (U.S.A. v. Ruggiero, CR-83-0000412), an attorney was convicted of racketeering and obstruction of justice for coaching his clients to lie during an investigation of a drug case. At bar plaintiffs allege that defendants' attorneys did not merely coach defendants but that they themselves lied on behalf of their clients on the record. Surely if an attorney who coaches a witness to lie on the record commits an indictable offense, one who makes false representations on the record also obstructs justice and, being an agent of defendants, his conduct is attributable to defendants.

This issue may appear minor and too insignificant for review by this Court. However, the number of cases brought in the District Courts continues to grow, the number of civil RICO cases perhaps outnumbering all other civil actions in growth. However, where parties and their attorneys are made aware

that they risk not only sanctions under the Federal Rules of Civil Procedure but also being charged with obstruction of justice for dilatory tactics, meritless pleading and material deception, actions will settle at an earlier procedural stage. The workload of the Federal Courts will thus be lightened. This lessening of the judicial burden renders this issue one of significant public importance that should be reviewed by this Court.

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari be granted.

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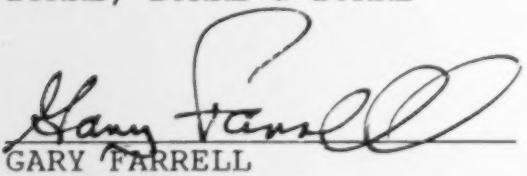
By: 

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A P P E N D I X

[FILED APR 2, 1990]

(TJM) EDNY 87 cv 1418 PLATT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States courthouse in the City of New York, on the second day of April, one thousand nine hundred and ninety.

P r e s e n t: HONORABLE IRVING R. KAUFMAN,

HONORABLE THOMAS J. MESKILL,

HONORABLE FRANK X. ALTIMARI,

Circuit Judges.

GLENN GUNN and DEBORA GUNN, JOSEPH REYNOLDS and CONSTANCE SIRSICK, RICHARD J. REYNOLDS and ROBERT J. REYNOLDS,

Plaintiffs-Appellants, Cross-Appellees,

v.

FRANK PALMIERI, KATAN GARDENS ASSOC., a partnership, BLOCK 5438 REALTY CORP., and TENADUS LTD.,

Defendants-Appellees,

FRANK PALMIERI, KATAN GARDENS ASSOC., a Partnership, BLOCK 5438 REALTY CORP.,

Defendants-Appellees, Cross-Appellants.

Docket Nos. 89-9056 89-9140

This is an appeal from an order of the United States District Court for the Eastern District of New York, Platt, C.J., denying plaintiffs-appellants' motion to amend their amended complaint pursuant to Fed. R. Civ. P. 15(a) and refusing to reinstate their claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 et seq. Reinstatement of claims was refused based on appellants' failure to plead fraud with the particularity mandated by Fed. R. Civ. P. 9(b). Defendants-appellees Palmieri, Katan Gardens Associates and Block 5438 Realty Corporation cross-appeal from that portion of an order entered earlier in the case denying their motion for the imposition of sanctions pursuant to Fed. R. Civ. P. 11.

This cause came on to be heard on the transcript of record from said district court and was taken on submission.

The orders of the district court are AFFIRMED.

Appellants rely primarily on allegations of mail and wire fraud pursuant to 18 U.S.C. §§1341 and 1343, respectively, to establish the requisite "pattern of racketeering activity" under 18 U.S.C. §1962(c). However, appellants' claim of fraud is based solely on the alleged misrepresentation, contained in the condominium offering plan and articulated at the closings, that the condominiums were "built in a workmanlike manner." Such a general allegation lacks the specificity and detail required by Rule ((b), and this deficiency alone justifies the dismissal of the RICO claims. See Beck v. Manufacturers Hanover Trust Co. 820 F.2d 46, 49-51 (2d Cir. 1987) (factual allegations must give rise to "strong inference" of requisite fraudulent intent), cert. denied, 484 U.S. 1005 (1988). See generally Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989) (particularity requirement of Rule 9(b) requires that complaint

"adequately specify the statements [plaintiff] claims were false or misleading, give particulars as to the respect in which plaintiff contended the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements"); DiVittorio v. Equidine Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987) (same); Luce v. Edelstein, 802 F.2d 49, 54 (2d Cir. 1986) (same). Furthermore, the proposed amended complaint submitted in support of appellants' motion to reinstate adds but one additional statement to buttress the fraud claim -- i.e., "defendants . . . did fail to inform plaintiffs of material defects in the construction of the structures." This, however, does little to remedy the aforementioned defects in the amended complaint. Under these circumstances, we are unable to conclude that Chief Judge Platt exceeded the bounds of discretion in denying

appellants' motion to amend and refusing to reinstate appellants' civil RICO claims. cf. Denny v. Barber, 576 F.2d 465, 470-71 (2d Cir. 1978) (motion for second amendment to plead fraud with greater particularity denied, when, in dismissing the initial complaint, district judge put plaintiff's counsel on notice of what was required to cure deficiencies).

We also do not believe that, in light of the confusion surrounding the "pattern" requirement in RICO actions prior to our decisions in United States v. Indelicato, 865 F.2d 1370 (2d Cir.) (in banc), cert. denied, 110 S. Ct. 56 (1989), and Beauford v. Helmsley, 865 F.2d 1386 (2d Cir.) (in banc), cert. denied, 110 S.Ct. 539 (1989), the district court erred in denying cross-appellants' motion for Rule 11 sanctions. It was far from "patently clear" that the RICO claims had "absolutely no chance of success under the existing precedents." Eastway Construction Corp. v. City of New York, 762

F.2d 243, 254 (2d Cir. 1985), cert. denied, 484 U.S. 918 (1987). We therefore affirm the district court's refusal to impose sanctions pursuant to Fed. R. Civ. P. 11. Appellees' request for the imposition of appellate sanctions pursuant to Fed. R. App. P. 38 is denied.

We have considered appellants' other contentions and find them to be without merit.

Irving R. Kaufman, U.S.C.J.

Thomas J. Meskill, U.S.C.J.

Frank X. Altimari, U.S.C.J.

N.B.: This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

[FILED OCT 4, 1989]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GLENN GUNN, et al.,	:	
Plaintiffs,	:	87 CV 1418
- against -	:	MEMORANDUM AND
FRANK PALMIERI, et al.,	:	ORDER
Defendants	:	

PLATT, Chief Judge

Plaintiffs move to reinstate this case and to amend their amended complaint to set forth the additional predicate offense of obstruction of justice and withdraw the pendent state claims. Plaintiffs base their motion on the recent Second circuit decisions in Beauford v. Helmsley, Slip Op [. No. 87-7216 (January 13, 1989) and United States v. Indelicato, Slip Op. Nos. 87-1085, 87-1215 (January 13, 1989), as well as, even more recently, the decision of the United States Supreme Court in H.J. Inc. v. Northwestern

Bell Telephone Co., Slip Op. No. 87-1252 (June 26, 1989).

BACKGROUND

Following an Order, dated September 6, 1989, of United States Magistrate John L. Caden recommending defendants make motions to dismiss the complaint and for sanctions, plaintiffs' attorney informed this court that he would pursue this action in State court. As a result, this case was administratively closed without prejudice on September 20, 1988. The parties have informed the undersigned that plaintiffs promptly commenced an action in Supreme Court, Richmond County.

Plaintiffs' motion to reinstate was referred to Magistrate Caden on March 21, 1989 for a report and recommendation because of his familiarity with this case. Magistrate Caden's Report and Recommendation, dated April 10, 1989, recommends plaintiffs' motion be denied for failure of plaintiffs' to

> clearly address how the proposed amended complaint now states a claim under RICO and specifically whether their claims now allege sufficient continuity to constitute a pattern of racketeering activity under the standards set forth in Beauford and Indelicato.

Magistrate Caden also finds the proposed amended complaint to be as defective under Rule 9(b) of the Federal Rules of Civil Procedure as the amended complaint which was the subject of his Order dated September 6, 1989. We agree.

DISCUSSION

While at first glance plaintiffs' attempt to comply with the "pattern" requirements of Beauford and Indelicato appear sufficient, upon closer examination these acts fail to show a pattern indicating illegal activity. In addition plaintiffs' second predicate act, obstruction of justice, while one of the predicate acts set forth in the RICO statue as pled here is ridiculous. If serving and filing an answer or a motion by any defendant in a federal action could be considered

obstruction of justice, this Court would be flooded with motions to amend complaints by plaintiffs seeking to add RICO claims based upon mail fraud and obstruction of justice as soon as an answer was served. Such an interpretation of the RICO statute is untenable.

CONCLUSION

Plaintiff's motion to reinstate is hereby denied.

Chief Judge, U.S.D.C.

Dated: Brooklyn, New York
September 29, 1989.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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GLENN GUNN and DEBORA GUNN, JOSEPH REYNOLDS and CONSTANCE SIRSICK, RICHARD J. REYNOLDS and ROBERT J. REYNOLDS,

ORDER

Plaintiffs,

CV-87-1418
(TCP)

- against -

FRANK PALMIERI, KATAN GARDENS ASSOC., a partnership, BLOCK 5438 REALTY CORP., and TENADUS LTD.,

Defendants.
----------X

CADEN, United States Magistrate

Before the court are numerous discovery disputes. Defendants argue, in essence, that plaintiffs' requests are excessive and that plaintiffs are attempting to use a frivolous RICO claim to discover evidence it would not otherwise be entitled to. In resolving the issue, the undersigned has reviewed, in significant detail, the submissions of the parties and particularly the complaint.

For the reasons more fully set out below, the undersigned stays all discovery pending

defendants' motion to dismiss the RICO cause of action and for sanctions pursuant to Rule 11.

FACTS

The plaintiffs summarize the nature of this action in the complaint as follows:

> This action is brought by plaintiffs in response to defendants' fraudulent schemes to construct and pass off shoddily built structures as completed residences in violation of contracts between defendants and purchasers of the structures including, but not limited to, plaintiffs, warranties and applicable building codes and standards. [sic] Among other things, defendants did conspire to pass off the structures referred to as completed residences and did transfer those structures for profit. Defendants used and are using profits obtained from the fraudulent schemes for operation of an enterprise which affects interstate commerce. Defendants advertised the structures referred to as completed residences in newspapers of general circulation that are sent through the mails and utilized the mails and interstate wires in furtherance of the fraudulent schemes.

Plaintiffs maintain that the following facts support their claims. On or about July

10, 1985, plaintiff Gunn contracted to purchase a condominium form defendants. (Complaint ¶ 17). During the construction of their home, plaintiffs allege that defendants consistently denied their request to have the structure inspected by an engineer. (Complaint ¶ 18). Plaintiffs inspected their home on June 23, 1986 just prior to closing, but maintain that they were hurried through the inspection by defendants representative. (Complaint ¶ 19). Plaintiffs Reynolds and Sirsick also contracted to purchase homes from defendants. (Complaint ¶¶ 21-25). They also were denied their request to have the homes inspected by an engineer. Plaintiffs allege they did not personally inspect the homes prior to closing but were assured that any problems would be rectified without delay. (Complaint ¶24). The contracts for sale allegedly specified that "plaintiffs were to receive title to homes that were completed and built in a workmanlike manner . . . [and that

the defendants] warranted the construction and [were] obligated to correct all defects in the construction." (Complaint ¶ 12). No factual basis for those allegations is included in the complaint, except for a recital of the dates upon which defendants advertised the housing project or put contracts to the individual plaintiffs in the mail. (Complaint ¶¶ 33-41).

For the purposes of this order, the undersigned takes these allegations as true. See Miree v. DeKalb County, 433 U.S. 25, 27 n.2 (1977).

DISCUSSION

The undersigned has reviewed plaintiffs' complaint, submissions, and statements made during the conferences before the undersigned, and concludes that the RICO claim raised lacks any logical or good faith basis under the statutes and cases cited. Accordingly the undersigned calls for the defendants to make a motion to dismiss, and stays all discovery

pending the outcome of the motion.

Although the magistrate can sua sponte dismiss the RICO claim, such action is best taken by the parties or the District Court Judge assigned this case. Rule 16(c)(1) states "[t]he participants at any conference under this rule may consider and take action with respect to the formulation and simplification of the issues, including the elimination of frivolous claims or defenses." According to the Notes of Advisory Committee on Rules:

> The reference in Rule 16(c)(1) to "formulation" is intended to clarify and confirm the courts power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone. See generally Meadow Gold Prods. Co. v. Wright, 278 F.2d 86 (D.C.Cir. 1960). The notion is emphasized by expressly authorized the elimination of frivolous claims or defenses at a pretrial conference. There is no reason to require that this await a formal motion for summary judgment. Nor is there any reason for the court to wait for the parties to initiate the

process called for in Rule 16(c)(1). (emphasis added).

RICO

In the recent case of Beck v. Manufacturers Hanover Trust Company, 645 F. Supp. 675 (S.D.N.Y. 1986), affirmed, 820 F.2d 46 (2d Cir. 1987) the court fully and accurately described the requirements necessary for a RICO complaint to withstand a motion for summary judgment. Although Beck arose under a different factual setting, Beck and plaintiffs herein couch their relief in the same terms, and raise the same legal arguments. In the interest of brevity and clarity, the undersigned adopts the Beck analysis as cited and summarized below.

> A private cause of action under RICO is authorized by 18 U.S.C. § 1964(c), which permits any person injured "by reason of" a violation of 18 U.S.C. §1962 to recover treble damages and attorney's fees. Section 1962 makes it unlawful to (a) invest income "derived . . . from a pattern cf racketeering activity" in an interstate enterprise, (b) acquire or maintain an enterprise "through a pattern of racketeering," (c) participate in

> the conduct of an enterprise "through a pattern of racketeering," or (d) conspire to violate any of these substantive prohibitions. A "pattern of racketeering activity" is defined in § 1961(b) to require commission of at least two crimes listed in § 1961(1), including mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343).[1]

Id. at 679. The undersigned does not question that defendants' activities affect interstate commerce, but questions whether the activity described evidences "racketeering" as the element of fraud has not been properly pleaded.

> "Racketeering activity" is the violation of one or more enumerated state and federal criminal offenses including mail and wire fraud under 18 U.S.C. §§ 1341 and 1343. 18 U.S.C. §1961(1).
>
> Plaintiffs rely entirely on allegations of mail and wire fraud to make out the requisite "pattern of racketeering activity" under RICO . . . Therefore, to sustain this action under RICO, plaintiffs must plead the elements of an indictable offense under the federal mail and wire fraud statutes by showing that each defendant (1) participated in a scheme to defraud, and (2) knowingly used the mails or interstate wires to further the scheme. E.g., United States v. Gelb, 700 F.2d 875, 879

(2d Cir.), cert. denied, 464 U.S. 853, 104 S.Ct. 167, 78 L.Ed.2d (1983).

> Furthermore, to prove mail or wire fraud, plaintiffs must show that the scheme was devised with specific intent to defraud, that any nondisclosures or affirmative misrepresentations were material, and, although the scheme's victims need not have in fact been defrauded, that some actual harm or injury was at least contemplated. United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981) (citing United States v. Von Barta, 635 F.2d 999, 1005 n.24, 1006 (2d Cir. 1980), cert. denied, 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981), cert. denied, 456 U.S. 915, 102 S.Ct. 1769 72 L.Ed.2d 174 (1982).

Id. at 680.

Rule 9(b) describes the requirements necessary to properly plead fraud, and thus satisfy the first element of the "racketeering activity" test.

> Rule 9(b) requires that "all averments of fraud . . . shall be stated with particularity." To satisfy Rule 9(b), the complaint must specify:
>
> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and

(2) the time and place of such statement and the person responsible

for making (or, in the case of omissions, not making) the same,

(3) the content of such statements and the manner in which they misled the [victim], and

(4) what the defendants "obtained as a consequence of the fraud." Conan Properties, Inc. v. Mattel, Inc., 619 F. Supp. 1167, 1172 (S.D.N.Y. 1985) (quoting Todd v. Oppenheimer & Co., 78 F.R.D. 415, 420-21 (S.D.N.Y. 1978)). Id. at 682.

Plaintiffs' complaint merely contains conclusory allegations totally lacking in specificity or detail. Although defendants' intent would properly have been pleaded generally, some factual basis, which would give rise to a strong inference of defendants' fraudulent intent, must be pleaded. Beck, 820 F.2d at 50. Accordingly, for this deficiency alone, the RICO claim may be properly dismissed.

However, the problems with plaintiffs' complaint do not end there. The complaint fails to adequately allege a RICO enterprise.

> An enterprise is a group of persons associated together for a common purpose of engaging in a course of conduct and is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. United States v. Turkette, 452 U.S. 576, 583 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981). This circuit requires that, under section 1962(c), the enterprise be a continuing operation and that the [predicate] acts be related to the common purpose. (emphasis added).

Ianniello, 808 F.2d at 191. Here the transaction began with the building of the residences and ended upon the sale of the last one thus, it had an obvious terminating goal or date, and does not constitute a continuing operation.[2] See, cf. United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986).

Moreover, plaintiffs' amended complaint is wholly deficient in its attempt to plead the RICO enterprise. The only statement in this regard is as follows:

ENTERPRISE (RICO)

> 31. Defendant Katan Gardens Assoc. is an enterprise within the meaning of 18 U.S.C. Sec. 1962.

Not a single fact or shred of evidence is proffered to explain <u>how</u> defendant Katan Gardens meets the statutory provision or the case law regarding it. Plaintiffs' requests for discovery must be addressed with these significant problems with the complaint in mind. The undersigned simply cannot order defendants to comply with plaintiffs' excessive demands when the complaint does not adequately plead a RICO claim. As noted, neither the fraud nor the enterprise element have been met.

It is also apparent, however, that merely amending its complaint (as it has in the past) will not remedy the problem. for, in addition to the pleading problems, plaintiffs do not have a good faith basis for bringing the RICO complaint. Rule 11 of the Federal Rules of Civil Procedure states in part:

> The signature of any attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other

> paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. ... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (emphasis added).

It is apparent that plaintiffs had no basis in fact for bringing the RICO claim. There are no facts to be gleaned from the complaint or the amended complaint. Moreover, at one point in the litigation plaintiffs agreed to drop the RICO complaint and proceed in State court on the breach of contract claims, thus, raising the inference that even the plaintiffs doubted whether a claim under

RICO properly lies.

More significantly, the interrogatory answers propounded by plaintiffs evidence their complete lack of knowledge of any facts supporting their allegations in the complaint. One of defendants' interrogatories asked, for example:

> As alleged by plaintiffs in paragraph 1 of the complaint:
>
> (a) Identify the persons who fraudulently schemed to construct and pass off shoddily built structures as completed residences.

Plaintiffs answered stating: "The persons referred to are defendant Palmieri and a person or person unknown to plaintiffs at this time but who is or are known to defendant." If in fact plaintiffs knows of only one person who participated in the alleged fraud, they cannot have had a good faith basis for raising the RICO claim in their fourth cause of action charging defendants with conspiracy. A conspiracy necessarily takes at least two participants.

Defendants also asked plaintiffs to:

> Identify each newspaper of general circulation that is sent through the mails wherein defendants advertised the structures referred to as complete residences.

Plaintiffs answered: "The information requested is within the exclusive control of defendants and not available to plaintiffs at this time." This answer evidence's plaintiffs lack of knowledge of any facts supporting their mail fraud allegations. The same claim that "the information requested is ... not available to plaintiffs at this time" is repeated in nearly every answer to defendants' interrogatories.

Consequently, the undersigned cannot but conclude that plaintiffs lacked a good faith basis for bringing the RICO claim. Accordingly, an order for dismissal and for sanctions pursuant to Rule 11 properly lie upon application by defendants for the same. On the basis of the information before the

court, the undersigned stays all discovery pending defendants' motion.

SO ORDERED.

JOHN L. CADEN
United States Magistrate
Eastern District of New York

Date: Brooklyn, New York
September , 1988.

FOOTNOTE

1.

In footnote 14 of Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), the Supreme Court suggested in dictum that "two predicate acts, while necessary to establish a pattern of racketeering activity, might not be sufficient to do so." Id. at 496 n.14; see 18 U.S.C. § 1961(5) ('"pattern of racketeering activity" requires at least two acts of racketeering activity')." United States v. Friedman, 87-1134, 87-1137, 87-1138, 87-1139, Slip Op. at 3901, 3963 (2d Cir. June 14, 1988). This issue of whether two acts alone can establish a pattern of racketeering was raised by defendant Kaplan in Friedman. The Second Circuit went on to quote language from the Senate Report on RICO stating:

> "The target [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern."
>
> 473 U.S. at 496 n.14 (quoting, with emphasis added, S.Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)). According to Kaplan, the Citisource bribes cannot constitute a pattern of racketeering activity because they arose from a single conversation with Lindenauer and were accordingly an "isolated incident" of "unitary character" lacking the "continuity" to which the footnote in Sedima referred.

Here also, plaintiffs charge defendants with "acts" which are unitary in character and have no continuity with respect to on going "frauds." Accordingly, this may constitute another reason for dismissing the RICO claim. However, since the Second Circuit granted a rehearing en banc in United States v. Indelicato, Nos. 87-1085, 87-1215 (2d Cir. argued June 13, 1988), to clarify this issue, the undersigned makes no determination of whether the "pattern or racketeering" element was sufficiently pleaded.

2.

Moreover, even though the "enterprise" -- i.e., the building project -- did not cease to exist after the alleged fraud, the fraudulent inducement to purchase was a discrete, definite event which is not sufficiently "continuing" for the purpose of stating a RICO claim. Khaimi v. Schonberger, 664 F.Supp. 54, 56 (E.D.N.Y.), aff'd, 838 F.2d 1203 (2d Cir. 1987).

So also here, plaintiffs have failed to plead that the "enterprise" continued indefinitely or to provide a description of the structure of Katan Gardens as an enterprise.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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GLENN GUNN and DEBORA GUNN, JOSEPH REYNOLDS and CONSTANCE SIRSICK, RICHARD J. REYNOLDS and ROBERT J. REYNOLDS,

REPORT AND RECOMMENDATION

Plaintiffs,

- against -

CV-87-1418 (TCP)

FRANK PALMIERI, KATAN GARDENS ASSOC., a partnership, BLOCK 5438 REALTY CORP., and TENADUS LTD.,

Defendants.
----------X

CADEN, United States Magistrate

Plaintiffs move to reinstate this case in light of the recent Second Circuit decisions in Beauford v. Helmsley, Slip op. No. 87-7216 (January 13, 1989), and United States v. Indelicato, Slip op. Nos. 87-1085, 87-1215 (January 13, 1989). Plaintiffs also move to amend their amended complaint to set forth the additional predicate offense of obstruction of justice and to withdraw the pendant state claims. After the undersigned recommended in

an order dated September 6, 1988 that defendants make a motion to dismiss, plaintiffs voluntarily discontinued this action and the case was administratively closed without prejudice on September 20, 1988. This motion was referred to the undersigned for a report and recommendation by order of Chief Judge Platt dated March 21, 1989.

The undersigned has reviewed plaintiffs' submissions in support of their motion. Plaintiffs' memorandum and affidavits fail to clearly address how the proposed amended complaint now states a claim under RICO and specifically whether their claims now allege sufficient continuity to constitute a pattern of racketeering activity under the standards set forth in Beauford and Indelicato. IN addition, it is apparent from a review of the proposed amended complaint that plaintiffs have done little to remedy the Rule 9(b) defects of its Amended complaint discussed in

the undersigned's September 6, 1988 order. As such, the undersigned recommends that plaintiffs' motion to reinstate this action be denied.

Respectfully submitted,

JOHN L. CADEN
United States Magistrate
Eastern District of New York

Dated: Brooklyn, New York
April 10th, 1989.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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GLENN GUNN and DEBORA GUNN, JOSEPH REYNOLDS and CONSTANCE SIRSICK, RICHARD J. REYNOLDS and ROBERT J. REYNOLDS,

Plaintiffs,

- against -

FRANK PALMIERI, KATAN GARDENS ASSOC., a partnership, BLOCK 5438 REALTY CORP., and TENADUS LTD.,

Defendants.
----------X

CV-87-1418

(TCP)

AMENDED COMPLAINT

Plaintiffs demand trial by Jury.

Plaintiffs, by their attorneys, Burke, Burke & Burke, complaining of defendants, allege as follows:

NATURE OF THE ACTION

1. This action is brought by plaintiffs in response to defendants' fraudulent scheme to construct and pass off shoddily built structures as completed residences in violation of contracts between defendants and purchasers of the structures including, but not limited to, plaintiffs,

warranties and applicable building codes, standards and laws. Among other things, defendants did conspire to pass off the structures referred to as completed residences and did pass off the structures referred to as completed residences and did transfer those structures for profit and did fail to inform plaintiffs of material defects in the construction of the structures. Defendants used and are using profits obtained from the fraudulent schemes for operation of an enterprise which affects interstate commerce. Defendants advertised the structures referred to as completed residences in newspapers of general circulation that are sent through the mails and utilized the mails and obstructed justice in furtherance of the fraudulent schemes.

JURISDICTION AND VENUE

2. This is an action for damages and other appropriate relief pursuant to the Racketeer Influenced and Corrupt Organization

Act (RICO), 18 U.S.C. § 1961, et seq.

3. The jurisdiction of this court is invoked pursuant to 18 U.S.C. § 1964(c).

4. Venue lies in this district pursuant to 18 U.S.C. § 1965 in that defendants reside, are found, have agents and transact their affairs in this district.

PARTIES

5. Plaintiffs are natural persons' resident in Staten Island, Richmond County, City and State of New York.

6. Defendant Palmieri is a natural person, president of defendant Block 5438 Realty Corp. (hereafter "5438 Realty"), and builder of the structures referred to in this complaint.

7. Defendant Katan Gardens Assoc. is a partnership consisting of defendant 5438 Realty, defendant Tenadus, Ltd., and defendant Palmieri.

8. Defendant 5438 Realty is a New York corporation entirely owned by defendant

Palmieri.

9. Defendant Tenadus, Ltd., is a New York corporation and a wholly owned subsidiary of the Union Savings Bank of Patchogue, New York.

10. On information and belief defendant Union Savings Bank is a New York corporation and the alter ego of defendant Tenadus, Ltd.

FACTS

11. In or about November, 1981, defendant Palmieri formed 5438 Realty.

12. In or about 1982, 5438 Realty formed a partnership with defendant Tenadus Ltd., which partnership is defendant Katan Gardens Assoc.

13. The purpose of the partnership was to construct alleged condominium residences in Staten Island in a shoddy manner and fraudulently pass them off as completed residences to purchasers in order to profit by the sale of those structures.

14. The partners agreed that defendant Union, through defendant Tenadus, Ltd., would supply the financing for the scheme and defendant Palmieri would be the builder.

15. The partners also agreed that the mails, telephone and advertising media would be used to further the sale of the structures as completed condominium residences.

16. On information and belief, the partners also agreed that the structures built would be built as cheaply as practicable regardless of the quality of the work and actual value of the completed structures and condition of the structures.

17. The partners also agreed that they would advertise and sell one hundred six (106) alleged condominium residences.

18. The partners also agreed that prospective purchasers would be directed to defendant Union to obtain purchase money

mortgages from which defendant Union would further profit.

19. Plaintiffs Glenn and Debora Gunn entered into a contract, dated July 10, 1985, to purchase a condominium residence located at 151 B Colon Avenue (a/k/a 8B Katan Loop), Staten Island, N.Y.

20. During the construction of the home that the Gunns had contracted to buy, the Gunns repeatedly requested that an engineer be permitted to inspect the construction of their home but were informed by defendants Palmieri and Katan Gardens that "the insurance company" would not permit anybody but construction workers on the site.

21. On June 23, 1986, the Gunns were taken to the site by a representative of defendant Katan Gardens, given the keys to their home and told to hurry and inspect because they had to get to the closing of title in Manhattan immediately.

22. Title to the Gunns' home closed June 23, 1986.

23. Plaintiffs Joseph Reynolds and Constance Sirsick entered into a contract dated December 13, 1985, to purchase a condominium residence located at 145 B Colon Avenue (a/k/a 5B Katan Loop) Staten Island, N.Y.

24. Plaintiffs Richard J. Reynolds and Robert J. Reynolds enter into a contract dated December 13, 1985, to purchase a condominium residence located at 145 A Colon Avenue (a/k/a 5A Katan Loop), Staten Island, N.Y.

25. None of these purchasers was permitted to have an engineer inspect the construction of their home.

26. Neither the Reynoldses nor Constance Sirsick was permitted to inspect their homes prior to closing, though at the closing they were assured by defendant Palmier that their homes were completed and any

problems that they had would be rectified without delay.

27. Title to the Reynoldses and Constance Sirsick's homes closed on June 27, 1986.

28. Pursuant to the contracts of sale and the condominium offering plan, plaintiffs were to receive title to homes that were completed and built in a workmanlike manner in accordance with certain plans and specifications, and defendants Palmieri and Katan Gardens Assoc. warranted the construction and are obligated to correct all defects in the construction.

29. Upon moving into the structures purchased by plaintiffs, plaintiffs discovered that the structures were constructed in a shoddy and unworkmanlike manner not in compliance with the plans and specifications referred to in the offering plan and contracts of sale or the codes, regulations and laws of the City or State of New York.

30. The shoddy and unworkmanlike manner of construction has resulted in unlevel floors, cracking walls, leaking roofs, warped joists and beams, unpolished taping surfaces, gaps between the walls and floors and windows and walls, uneven walls and ceilings and other problems.

31. Most of the structures in the development have similar problems though the model home that plaintiffs were shown prior to signing the contracts of sale had no such problems and was constructed in a professional and workmanlike manner.

32. Plaintiffs have complied with their obligations under the contracts of sale by giving notice to defendants of the defects and have demanded that the defects be corrected, but defendants have failed and refused to correct the defects.

ENTERPRISE (RICO)

33. Defendant Katan Gardens Assoc. is an enterprise within the meaning of 18

U.S.C. § 1962.

34. The enterprise referred to is a continuing enterprise in that at the time of the execution of the contracts between plaintiffs and defendants, the offering plan (at page 1) stated that the sponsor had reserved the right to construct less than the number of units (106) originally called for. Thus, at that time, the sponsor had yet to decide whether to sell 106 units or thirty-four units or some number in between. (A copy of the statement referred to is annexed as Exhibit A).

35. Thus, the scheme, which eventually resulted in 106 units, continued long after plaintiffs were damaged and threatened to so continue because at the time of the sales to plaintiffs more than seventy (70) units remained to be sold to unwary purchasers.

PERSON (RICO)

36. Defendants are persons who

conducted the affairs of the enterprise within the meaning of 18 U.S.C. § 1962.

PATTERN OF RACKETEERING (RICO)

MAIL FRAUD

37. On or about December 9, 1985, defendants used the United States mails to further the fraudulent scheme by placing the proposed contract of sale to 145 B Colon Avenue in the mails. Defendants' attorney and agent Raymond L. Liebman forwarded said contract of sale to plaintiffs' attorney by mail.

38. On or about November 25, 1985, defendants used the United States mails to further the fraudulent scheme by placing pages 31 and 32 of the offering plan, which pages of the offering plan were missing from the offering plan, in the mails. Defendants' agent Loretta Miller forwarded said pages to plaintiffs' attorney by mail.

39. On or about December 9, 1985, defendants used the United States mails to

further the fraudulent scheme by placing the proposed contract of sale to 145 A Colon Avenue in the mails.

Defendants' attorney and agent Raymond L. Liebman forwarded said contract to plaintiffs' attorney by mail.

40. In or about May, 1985, defendants used the United States mails to further the fraudulent scheme by placing the proposed contract of sale to 151 B Colon Avenue in the mails. Defendants' attorney and agent forwarded said contract to the attorney for plaintiffs Gunn by mail.

41. In or about 1983 to 1986 defendants used the United States mails to further the fraudulent scheme by advertising the sale of the structures in newspapers of general circulation including, but not limited to, the Staten Island Advance which defendants knew or had reason to know used the mails to transmit their publications. (A copy of the advertisement from the Staten Island Advance

of June 28, 1985, is annexed as Exhibit B).

42. The publications referred to are sent to hundreds of their subscribers through the U.S. mails.

43. On or about June 10th to 20th, 1985, plaintiffs Glenn and Debora Gunn observed an advertisement for the project in the Staten Island Advance.

44. As a result of that advertisement, plaintiffs Glenn and Debora Gunn enquired about the project and eventually purchased a residence in the project.

45. Each of the uses of the mails, including mailing of the newspapers containing advertisements for the project is a mailing in furtherance of the fraudulent scheme and constitutes a distinct instance of mail fraud as defined at 18 U.S.C. § 1341, and is, therefore, a separate racketeering activity within the meaning of 18 U.S.C. § 1961(5).

B. OBSTRUCTION OF JUSTICE

46. Defendants did with their

attorneys intentionally and corruptly obstruct and impede the due administration of justice and a court of the United States in violation of 18 U.S.C. § 1503.

47. Defendants did intentionally and corruptly impede and obstruct the due administration of justice and a court of the United States in this action by the following acts:

I. serving and filing responsive pleadings that contained patently false denials of material facts including, but not limited to, that defendants did not breach the contracts with plaintiffs and that defendants did not commit fraud;

II. making patently false representations on the record and before the court including, but not limited to, representations made by defendant Palmieri's attorney on June 16, 1988, that defendant Palmieri does not read or write the English language and that

defendant Palmieri cannot testify without an interpreter and by defendant Palmieri giving a false residence address for defendant Palmieri and representations made to the court on November 22, 1988, that defendants had submitted documents to plaintiffs and that defendants had not received copies of the transcript of Palmieri's deposition;

III. obstructing plaintiffs' discovery by refusing to submit documents to plaintiffs which documents were properly requested and directing defendant Palmieri not to answer questions at his deposition that were properly put to him; and

IV. making a frivolous motion to the District Court for the purpose of impeding an action brought by plaintiffs in the Supreme Court of the State of New York which frivolous motion was returnable on November 22, 1988.

48. These actions constitute obstruction of justice as defined at 18 U.S.C. § 1503.

49. Each of these actions is a separate and distinct violation of 18 U.S.C. § 1503.

50. The actions complained of were committed in furtherance of the scheme in that their purpose was to prevent plaintiffs from recovering their loss and/or damages suffered as a result of the fraudulent scheme and to aid defendants to retain the fruits of the fraudulent scheme and are acts preformed in the conduct of the affairs of the enterprise in violation of 18 U.S.C. § 1962(c).

51. Each instance of mail fraud and obstruction of justice is a predicate offense pursuant to 18 U.S.C. § 1961.

52. Thus, the conduct of these activities in furtherance of the fraudulent scheme constitutes a pattern of racketeering within the meaning of 18 U.S.C. § 1962.

INTERSTATE OR FOREIGN COMMERCE (RICO)

53. The enterprise referred to affects interstate commerce in that goods used in the construction of the structures referred to were shipped in interstate commerce as were the tools and machinery used in the construction and the appliances placed in the structures referred to.

FIRST CAUSE OF ACTION

(18 U.S.C. § 1962(a))

54. Paragraphs "1" through "52" are repeated as though set forth in full here.

55. Defendants have used and are using the income derived from the fraudulent scheme for the operation of an enterprise, the activities of which affect interstate commerce in violation of 18 U.S.C. § 1962(a).

56. That enterprise is defendant Katan Gardens Assoc. 57. Defendants' violation of 18 U.S.C. § 1962(a) has injured plaintiffs in their property.

SECOND CAUSE OF ACTION

(18 U.S.C. § 1962(b))

58. Paragraphs "1" through "52" are repeated as though set forth in full here.

59. Defendants have used and are using the income derived from the fraudulent scheme to maintain their interest in and control over an enterprise the activities of which affect interstate commerce in violation of 18 U.S.C. § 1962(b).

60. That enterprise is defendant Katan Gardens Assoc.

61. Defendants' violation of 18 U.S.C. § 1962(b) has injured plaintiffs in their property.

THIRD CAUSE OF ACTION

(18 U.S.C. § 1962(c))

62. Paragraphs "1" through "52" are repeated as though set forth in full here.

63. Defendants Palmieri, 5438 Realty, Tenadus, Ltd., and Union Savings Bank have conducted the affairs of defendant Katan

Gardens Assoc. through a pattern of racketeering in violation of 18 U.S.C. § 1962(c).

64. Defendants' violation of 18 U.S.C. § 1962(c) has injured plaintiffs in their property.

FOURTH CAUSE OF ACTION

(18 U.S.C. § 1962(d))

65. Paragraphs "1" through "52" are repeated as though set forth in full here.

66. Defendants conspired among themselves to violate 18 U.S.C. §§ 1962 (a), (b) and (c) in violation of 18 U.S.C. § 1962(d).

67. Defendants' violation of 18 U.S.C. § 1962(d) has injured plaintiffs in their property.

WHEREFORE, plaintiffs demand judgment as follows:

a) As to the first through fourth causes of action, actual damages in a sum not presently known but reasonably believed

to be approximately $350,000.00;

b) Treble damages pursuant to 18 U.S.C. § 1964(c);

c) Attorneys fees pursuant to 18 U.S.C. § 1964(c);

d) Costs and disbursements of this action;

e) Such other and further relief as the court deems just and proper.

Dated: New York, New York
February 6, 1989.

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